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No. 04-5928

In the Supreme Court of the United States

JOSE ERNESTO MEDELLIN, PETITIONER

v.

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether petitioner can make the "substantial showing of the denial of a constitutional right" (28 U.S.C. 2253(c)) necessary to obtain a certificate of appealability, in light of the fact that petitioner seeks to appeal the denial of a treaty claim, rather than a constitutional claim, and he cannot make a substantial showing that the state court's ruling rejecting his claim was contrary to, or an unreasonable application of, a Supreme Court precedent.

2. Whether the Vienna Convention on Consular Relations gives a foreign national a judicially enforceable right to challenge his conviction and sentence on the ground that he was denied consular assistance, and requires a state court to consider that claim, notwithstanding the foreign national's procedural default by failing to raise the claim at trial or on direct appeal in the state courts.

3. Whether the decision of the International Court of Justice in *Avena*, 2004 I.C.J. 128 (Mar. 31), that petitioner is entitled to "review and reconsideration" of his conviction and sentence establishes, by itself, a rule of decision in petitioner's case.

4. Whether the President's determination, pursuant to the United Nations Charter and his foreign affairs authority, that the *Avena* decision is enforceable in state court, in accordance with principles of comity and without respect to state rules of procedural default, is valid.

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INTEREST OF THE UNITED STATES

This case presents a claim by a Mexican national, proceeding on federal habeas corpus, to have the courts of the United States enforce a determination by the International Court of Justice (ICJ) that his rights under the Vienna Convention on Consular Relations (Vienna Convention) were violated and that he is entitled to review and reconsideration of his state conviction and capital sentence. The United States is party to the Vienna Convention. The United States is also party to the Charter of the United Nations, 59 Stat. 1031, T.S. No. 993 (1945), and thus is party to the Statute of the ICJ, 59 Stat. 1055, T.S. No. 993, U.N. Charter Art. 93(1); ICJ Statute Art. 1. The President, through subordinate

Executive Branch officials, represents the United States in ICJ proceedings and in the United Nations (U.N.), and he has the lead role in determining whether, and if so, how, to comply with the determinations of such international bodies. The United States also has a substantial interest in the interpretation and effect given to international instruments to which it is a party. At the invitation of the Court, the United States filed a brief addressing similar issues in *Breard* v. *Greene*, 523 U.S. 371 (1998) (per curiam).

STATEMENT

1. *The Vienna Convention.* In 1969, with the advice and consent of the Senate, see 115 Cong. Rec. 30,997, the President ratified the Vienna Convention, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. Article 36 of the Vienna Convention, 21 U.S.T. 100-101, 596 U.N.T.S. 292-293, is designed to "facilitat[e] the exercise of consular functions relating to nationals of the sending State." Toward that end, Article 36 provides that "consular officers shall be free to communicate with nationals of the sending State and to have access to them." Vienna Convention Art. 36(1)(a).

Article 36 further provides that "[i]f he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner." Vienna Convention Art. 36(1)(b). In addition, "[a]ny communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay." *Ibid.* State authorities "shall inform the person concerned without delay of his rights under [Article 36]." *Ibid.*

Article 36 also provides that "consular officers shall have the right to visit a national of the sending State who is in

prison, custody or detention, to converse and correspond with him and to arrange for his legal representation." Vienna Convention Art. 36(1)(c). It specifies that consular officers also "have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment." *Ibid.* At the same time, it provides that "consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action." *Ibid.*

The rights referred to in Article 36(1) "shall be exercised in conformity with the laws and regulations of the receiving State." Vienna Convention Art. 36(2). That requirement "is subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended." *Ibid.*

An Optional Protocol to the Vienna Convention, which the President also ratified in 1969, 21 U.S.T. 77, provides that "disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice." Optional Protocol Concerning the Compulsory Settlement of Disputes Art. I, 21 U.S.T. 326, 596 U.N.T.S. 488. Any party to the Optional Protocol may bring such disputes before the International Court of Justice. *Ibid.*

2. *State Court Proceedings.* a. Petitioner, a Mexican national who has continually resided in the United States since his pre-school years, was a member of the "Black and Whites" street gang. Pet. App. 4a, 46a. On the night of June 24, 1993, petitioner and fellow gang members gathered to initiate a new member. *Ibid.* That same night, 14-year-old Jennifer Ertman and 16-year-old Elizabeth Pena encountered the gang members. *Ibid.* As the girls passed by, petitioner attempted to engage Elizabeth in conversation. *Ibid.* When Elizabeth tried to run from him, petitioner grabbed

her and threw her to the ground. *Ibid.* When Jennifer tried to assist Elizabeth, gang members grabbed her and threw her to the ground. *Ibid.* Petitioner and several other gang members then brutally raped each of the girls. *Id.* at 5a. To conceal the rapes, the gang members killed both girls and discarded their bodies in a wooded area. *Id.* at 5a-6a. Petitioner strangled at least one of the girls. *Id.* at 6a.

After a trial, petitioner was convicted of capital murder, and the jury recommended a death sentence. Consistent with the jury's recommendation, the district court sentenced petitioner to death. Petitioner, who had the assistance of counsel, did not assert any claim under the Vienna Convention at trial or at sentencing.

The Texas Court of Criminal Appeals affirmed petitioner's conviction and sentence. Pet. App. 1a-31a. Petitioner raised numerous issues on appeal, but he did not raise a Vienna Convention claim.

b. In post-conviction state court proceedings, petitioner claimed for the first time that the failure to inform him of his rights under the Vienna Convention required reversal of his conviction and sentence. The state trial court rejected that claim on four grounds. First, the court held that, because petitioner failed to raise that claim at trial, petitioner was procedurally barred from raising it in post-conviction proceedings. Pet. App. 55a-56a. Second, the court held that petitioner had failed to show that he was a foreign national. *Id.* at 56a. Third, the court held that, as a private individual, petitioner lacked standing to enforce the Vienna Convention. *Ibid.* Finally, the court held that petitioner failed to show that he was harmed by the alleged Vienna Convention violation because he was "provided with effective legal representation" and his "constitutional rights were safeguarded." *Id.* at 56a-57a. Finding the trial court's findings and conclusions supported by the record, the Texas Court of Criminal Appeals summarily affirmed. *Id.* at 32a-33a.

3. *The Federal District Court's Decision On Habeas.* Petitioner then filed a petition for a writ of habeas corpus in federal district court, claiming that he was not informed of his rights under the Vienna Convention and that he was therefore entitled to a new trial. Pet. App. 79a. The district court rejected that claim. *Id.* at 79a-85a. The court first held that petitioner's failure to raise his Vienna Convention claim at trial in accordance with the State's contemporaneous objection rule constituted an adequate and independent state ground barring federal habeas court review. *Id.* at 79a-82a. In reliance on *Breard* v. *Greene*, 523 U.S. 371, 375-376 (1998) (per curiam), the district court rejected petitioner's claim that Vienna Convention claims are exempt from the procedural default doctrine. Pet. App. 80a-81a.

The district court also rejected petitioner's argument that it should follow the intervening decision of the ICJ in *Federal Republic of Germany* v. *United States*, 2001 I.C.J. 466 (June 27) (*LaGrand*). In that case, the ICJ "conclude[d] that Article 36, paragraph 1, creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in this Court by the national State of the detained person." *Id.* ¶ 77, at 493. The ICJ further concluded that the application of procedural default to preclude the LaGrands from challenging their convictions and sentences violated Article 36(2) because it "had the effect of preventing 'full effect [from being] given to the purposes for which the rights accorded under this article are intended.'" *Id.* ¶ 91, at 497-498. The district court refused to follow the *LaGrand* court's procedural default ruling on the ground that it conflicted with *Breard*. Pet. App. 82a.

The district court further held that, even if petitioner could surmount his procedural default, he would not be entitled to relief. Pet. App. 82a. The court explained that the state court's ruling that private individuals lack standing to enforce the Vienna Convention was consistent with control-

ling Fifth Circuit precedent, and that the announcement of a new rule that the Vienna Convention creates judicially enforceable rights would be barred on habeas review under *Teague* v. *Lane*, 489 U.S. 288 (1989). Pet. App. 82a- 83a.

Finally, the district court held that, even if procedural default and non-retroactivity principles did not bar petitioner's claim, and even if petitioner had standing to assert a Vienna Convention claim, *Breard* would require petitioner to establish that the denial of his Vienna Convention rights caused "concrete, non-speculative harm." Pet. App. 84a. The district court concluded that the state habeas court's determination that he had failed to make such a showing was not "contrary to, or an unreasonable application of, federal law." *Id.* at 84a-85a (citing 28 U.S.C. 2254(d)(1)). The court therefore denied petitioner's claim for habeas relief as well as his application for a certificate of appealability (COA). *Id.* at 59a, 118a.

4. *The ICJ's Decision In* Avena. While petitioner's application for a COA was pending in the Fifth Circuit, the ICJ issued its decision in *Mexico* v. *United States*, 2004 I.C.J. 128 (Mar. 31) (*Avena*) (Pet. App. 174a-274a). In that case, Mexico alleged violations of the Vienna Convention with respect to a number of Mexican nationals facing the death penalty, including petitioner. As in *LaGrand*, the ICJ concluded that Article 36(1)(b) gives detained foreign nationals individual rights that the national's State may invoke in a proceeding before the ICJ. Pet. App. 214a, para. (40). The ICJ further found that the United States had violated Article 36(1)(b) by not informing 51 Mexican nationals, including petitioner, of their Vienna Convention rights, and by not notifying consular authorities of the detention of 49 Mexican nationals, including petitioner. *Id.* at 271a, paras. (4) and (5). The ICJ made additional findings with respect to violations of Mexico's rights under Article 36(1)(a) and (c). *Id.* at 271a-272a, paras. (6) and (7). The ICJ

found that the appropriate remedy "consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the [affected] Mexican nationals, * * * by taking into account * * * paragraphs 138 to 141 of this Judgment." *Id.* at 273a, para. (9).

In paragraph 143, the ICJ found "that the clemency process, as currently practiced within the United States criminal justice system, does not appear to meet the requirements described in paragraph 138 above and that it is therefore not sufficient in itself to serve as an appropriate means of 'review and reconsideration' as envisaged by the Court." Pet. App. 263a. In paragraph 140, the ICJ specified that it "considers that it is the judicial process that is suited to this task." *Id.* at 262a. In paragraph 121, the ICJ made clear that it did not prescribe a particular outcome for the review and reconsideration, but instead specified that it was for the United States to determine in each case whether the violation of Article 36 "caused actual prejudice to the defendant in the process of administration of criminal justice." *Id.* at 253a. In paragraph 139, the ICJ made clear that the prejudice inquiry must give "full weight to violation of the rights set forth in the Vienna Convention," and must be separate from an inquiry whether the defendant experienced harm cognizable as a violation of due process under the United States Constitution. *Id.* at 261a-262a.

5. *The Court Of Appeals' Decision.* The court of appeals denied petitioner's application for a COA. Pet. App. 119a-135a. The court first held that petitioner had defaulted on his Vienna Convention claim by failing to raise it at trial. *Id.* at 131a. The court was unwilling to excuse petitioner's default based on the ICJ's decisions in *Avena* and *LaGrand*. *Id.* at 131a-132a. The court concluded that, while *Avena* and *LaGrand* were decided after *Breard*, it was not free to

disregard *Breard*'s holding "that ordinary procedural default rules bar Vienna Convention claims." *Id.* at 132a.

The court of appeals also held that petitioner could not prevail on the merits. Pet. App. 132a-133a. The court explained that a prior Fifth Circuit panel had "held that Article 36 of the Vienna Convention does not create an individually enforceable right." *Id.* at 133a. After noting that the ICJ had concluded that the Vienna Convention creates individual rights, the court held that it was "bound to apply" its own precedent "until either the [Fifth Circuit] sitting *en banc* or the Supreme Court say otherwise." *Ibid.*

SUMMARY OF ARGUMENT

Petitioner seeks a holding from this Court that the ICJ's *Avena* decision is the product of a binding treaty obligation, giving him a judicially enforceable right to review and reconsideration of his conviction and sentence; alternatively, he asks that *Avena* be enforced as a matter of comity. This Court should not address those claims. Petitioner, who was denied a writ of habeas corpus in federal district court, requires a certificate of appealability in order to pursue the merits of his claims on appeal. He is, however, jurisdictionally barred from obtaining a COA. First, a COA may be obtained only for constitutional claims, not for treaty claims. Second, a COA may not issue in this case because petitioner cannot meet the Antiterrorism and Effective Death Penalty Act requirement to show that the state court's denial of relief was contrary to, or an unreasonable application of, any holding of this Court. To the contrary, the state court's decision was consistent with this Court's decision in *Breard*. The Court should therefore either affirm the judgment below or dismiss the writ as improvidently granted.

Should the Court reach the merits, it should reject petitioner's reliance on international treaties and the ICJ's decision as free-standing sources of law under which he can obtain judicial review and reconsideration of his conviction and sentence. Neither the Vienna Convention, the Optional Protocol, nor the U.N. Charter—the relevant treaties at issue—provides petitioner with judicially enforceable private rights. Article 36 of the Vienna Convention confers no private, judicially enforceable rights, and the ICJ decision, standing alone, establishes solely an international obligation for the United States. It is for the President, not the courts, to determine whether the United States should comply with the decision, and, if so, how.

In this case, the President, the nation's representative in foreign affairs, has determined that the United States will comply with the ICJ decision. Compliance serves to protect the interests of United States citizens abroad, promotes the effective conduct of foreign relations, and underscores the United States' commitment in the international community to the rule of law. Accordingly, in the exercise of his constitutionally based foreign affairs power, and his authority under the United Nations Charter, the President has determined that compliance should be achieved by the enforcement of the ICJ decision in state courts in accordance with principles of comity. That presidential determination, like an executive agreement, has independent legal force and effect, and contrary state rules must give way under the Supremacy Clause.

In accordance with the President's determination, petitioner can seek review and reconsideration of his Vienna Convention claim, without regard to state law doctrines of procedural default, by filing an appropriate action in state court for enforcement of the ICJ's decision under principles of comity. State courts will then provide the review and reconsideration that the President has determined is an appropriate means to fulfill this nation's treaty obligations.

ARGUMENT

PETITIONER'S CLAIM BASED ON THE DECISION OF THE INTERNATIONAL COURT OF JUSTICE DOES NOT ENTITLE HIM TO RELIEF IN THIS CASE

I. THE COURT OF APPEALS CORRECTLY REFUSED TO ISSUE A CERTIFICATE OF APPEALABILITY

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a state prisoner may not appeal from a district court decision denying habeas relief "[u]nless a circuit justice or judge issues a certificate of appealability". 28 U.S.C. 2253(c)(1). Petitioner was denied a COA by the court of appeals. The denial of a COA was correct and compelled by provisions of the AEDPA.

A. The COA Requirement Is Jurisdictional

Obtaining a COA is a "jurisdictional prerequisite" to an appeal. *Miller-El* v. *Cockrell*, 537 U.S. 322, 336 (2003). A COA may issue only when a petitioner has made a "substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). Under that standard, the petitioner must show that "reasonable jurists could debate (or, for that matter agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack* v. *McDaniel*, 529 U.S. 473, 484 (2000) (citation omitted). That analysis must take into account the AEDPA's standards for granting relief. An appellate court "looks to the District Court's application of AEDPA to petitioner's constitutional claims and ask[s] whether that resolution was debatable amongst jurists of reason." *Miller-El*, 537 U.S. at 336. Thus, "[a] circuit justice or judge must deny a COA, even when the habeas petitioner has made a substantial showing that his constitutional rights were violated, if all reasonable jurists

would conclude that a substantive provision of the federal habeas statute bars relief." *Id.* at 349-350 (Scalia, J., concurring).

This Court has jurisdiction under 28 U.S.C. 1254 to review a court of appeals' denial of a COA. *Hohn* v. *United States*, 524 U.S. 236, 254 (1988). In such a case, the question before the Court is the same as the question before the court of appeals—whether, in light of the AEDPA's limitations, the petitioner has a made a substantial showing of the denial of a constitutional right. See *Miller-El*, 537 U.S. at 336. The Court resolves only that threshold question; it does not resolve the merits of the claim. *Id.* at 348.

In this case, petitioner seeks to bypass that threshold question in order to obtain this Court's ruling on the merits of his claim that the Vienna Convention, as interpreted by the ICJ in *Avena* and *LaGrand*, requires review and reconsideration of his conviction and sentence. That claim, however, is not properly presented. Instead, the question properly presented is whether petitioner satisfied the requirements for the issuance of a COA. Because the COA requirement is jurisdictional, this Court must address whether a COA may issue, regardless of whether or not objections to its issuance were properly preserved.[1]

Jurisdictional prerequisites may not be waived by the parties. *Mansfield, Coldwater & Lake Mich. Ry.* v. *Swan*, 111 U.S. 397, 382 (1984). And a substantial showing of a denial of a "constitutional" right (28 U.S.C. 2253(c)(2)) is a prerequisite for issuance of a COA. Because the issuance of a COA is

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[1] In this case, respondent did not assert in the court of appeals or in his opposition to the petition for a writ of certiorari that a COA may not issue to review a treaty claim (see Section I(B), *infra*), although respondent did assert in the court of appeals that a COA could not issue because the state court's procedural default decision was not contrary to, or an unreasonable application of, Supreme Court precedent (see Section I(C), *infra*). See Resp. C.A. Opp. to App. for COA 36-39 (No. 03-20687).

jurisdictional, *Miller-El*, 537 U.S. at 336, it follows that the necessary predicate for obtaining a COA—a substantial showing of a denial of a constitutional right—is also jurisdictional. *United States* v. *Cepero*, 224 F.3d 256, 261-262 (3d Cir. 2000) (en banc), cert. denied, 531 U.S. 1114 (2001); cf. *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312, 315 (1988) (requirements in Federal Rule of Civil Procedure 3 (1976) on what a notice of appeal must contain are jurisdictional).[2]

For two reasons, petitioner failed to make the required showing. First, petitioner seeks to appeal a claim based on a treaty, not the denial of any "constitutional" right. 28 U.S.C. 2253(c). Second, the state court decision that petitioner challenges was not contrary to, or an unreasonable application of, clearly established federal law as determined by this Court. 28 U.S.C. 2254(d)(1). Those substantive limits bar issuance of a COA and require that the court of appeals' judgment be affirmed.

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[2] Some courts of appeals have held that, once a COA has been issued, they have jurisdiction to decide non-constitutional claims. See, *e.g.*, *Young* v. *United States*, 124 F.3d 794, 799 (7th Cir. 1997), cert. denied, 524 U.S. 928 (1998); *United States* v. *Talk*, 158 F.3d 1064, 1068 (10th Cir. 1998), cert. denied, 525 U.S. 1164 (1999); *Soto* v. *United States*, 185 F.3d 48, 52 (2d Cir. 1999). Those courts have reasoned that addressing the merits can promote the conservation of judicial resources. Congress, however, has determined that judicial resources are best conserved when habeas appeals are limited to cases where a petitioner can make a substantial showing of the denial of a constitutional right. In any event, in this case, no certificate of appealability has been issued, and the absence of a substantial constitutional question is apparent. In those circumstances, the assertion of a treaty claim, rather than a constitutional claim may not be overlooked. Nor can a court overlook the substantive standards of the AEDPA and issue a COA on a claim that is clearly precluded by those standards.

B. A COA May Not Issue To Review A Claimed Denial Of A Treaty Right

1. Petitioner claims a denial of a treaty right, not a constitutional right, and a COA may issue only to review a claimed denial of a constitutional right. While a federal district court has jurisdiction to entertain a habeas petitioner's claim that he "is in custody in violation of *the Constitution or laws or treaties of the United States*," 28 U.S.C. 2254(a) (emphasis added), a COA may issue only when a petitioner has made a "substantial showing of the denial of a *constitutional right*." 28 U.S.C. 2253(c)(2) (emphasis added). Because petitioner's habeas claim is based on an alleged violation of a treaty, the district court had jurisdiction to entertain it. But since a treaty right is not a "constitutional right," a COA may not issue to review the district court's resolution of petitioner's treaty claim. See *Breard* v. *Greene*, 523 U.S. 371, 376 (1998) (1998) (per curiam) (a treaty has the same status as a federal statute).

The background to the AEDPA confirms that a COA may issue to review only a constitutional claim, and that claims based on other sources of federal law, such as federal statutes and treaties, are not appealable. Under pre-AEDPA law, a state petitioner was required by statute to obtain a certificate of probable cause (CPC) in order to appeal. The statute did not specify the standard for obtaining a CPC, but the Court held in *Barefoot* v. *Estelle*, 463 U.S. 880, 893 (1983), that a CPC could be obtained only if the petitioner could make a "substantial showing of the denial of [a] *federal* right" (emphasis added). The AEDPA codifies the *Barefoot* standard, except that it "substitut[es] the word 'constitutional' for the word 'federal.'" *Slack*, 529 U.S. at 483. Thus, before the AEDPA, a state petitioner could appeal any "federal" claim—whether it was based on the Constitution, a law, or a treaty. Under the AEDPA,

however. a petitioner may appeal only a "constitutional" claim; a petitioner may not appeal a claim based on a federal statute, a federal rule, or a treaty.[3]

2. The AEDPA's requirement that a petitioner seeking a COA must make a substantial showing of a denial of a "constitutional right" (28 U.S.C. 2253(c)(2)) cannot be circumvented by characterizing an alleged treaty right as a constitutional right under the Supremacy Clause. The Supremacy Clause "'is not a source of any federal rights'; it 'secure[s] federal rights by according them priority whenever they come in conflict with state law.'" *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103, 107 (1989) (quoting *Chapman Houston Welfare Rights Org.*, 441 U.S. 600, 613 (1979)). If the term "constitutional" right encompassed a treaty right, it would render superfluous the terms "laws and treaties" in the provision granting federal district courts jurisdiction to entertain habeas claims, see 28 U.S.C. 2254(a), and it would fail to give effect to Congress's substitution of the word "constitutional" for the word "federal" in defining the claims that may be reviewed on appeal. See *Slack*, 529 U.S. at 483. The Court has refused to treat a claim arising

[3] The courts of appeals have uniformly reached that conclusion. See *Young* v. *United States*, 124 F.3d 794, 798-799 (7th Cir.) (COA may not issue to review statutory claim), cert. denied, 524 U.S. 928 (1998); *Murphy* v. *Netherland*, 116 F.3d 97, 99-100 (4th Cir.) (COA may not issue to review treaty claim), cert. denied, 521 U.S. 1144 (1977). See also *United States* v. *Vargas*, 393 F.3d 172, 175 (D.C. Cir. 2004) (COA may not issue to review claim under Federal Rule of Civil Procedure 60(b)); *Marshall* v. *Hendricks*, 307 F.3d 36, 80-81 (3d Cir. 2002) (COA may not issue to review statutory claim), cert. denied, 538 U.S. 911 (2003); *United States* v. *Mikels*, 236 F.3d 550, 551 (9th Cir. 2000) (COA may not issue to review statutory claim); *United States* v. *Cepero*, 224 F.3d 256, 262-267 (3d Cir. 2000) (en banc) (COA may not issue to review claim under the Sentencing Guidelines), cert. denied, 531 U.S. 1114 (2001); *United States* v. *Gordon*, 172 F.3d 753, 754-755 (10th Cir. 1999) (COA may not issue to review claim under Federal Rule of Criminal Procedure 32).

under the Supremacy Clause as a claim arising under the Constitution in comparable circumstances. *Golden State*, 493 U.S. at 107 & n.4 (right secured by the Supremacy Clause is not a right "secured by the Constitution" under 42 U.S.C. 1983); *Chapman*, 441 U.S. at 614-615 (right secured by the Supremacy Clause is not a right "secured by the Constitution" under 28 U.S.C. 1343); *Swift & Co.*, v. *Wickham*, 382 U.S. 111, 126-127 (1965) (injunction sought on the ground that a state statute violates the Supremacy Clause is not sought "upon the ground of the unconstitutionality of such statute" within the meaning of 28 U.S.C. 2281 (1958)).

Thus, "the Supremacy Clause does not convert violations of treaty provisions (regardless of whether those provisions can be said to create individual rights) into violations of *constitutional* rights." *Murphy* v. *Netherland*, 116 F.3d 97, 100 (4th Cir.), cert. denied, 521 U.S. 1144 (1977). "Just as a state does not violate a constitutional right merely by violating a federal statute, it does not violate a constitutional right merely by violating a treaty." *Ibid.* A COA therefore may not be issued to review petitioner's Vienna Convention claim. *Ibid.*

C. Petitioner Failed To Make A Substantial Showing That The State Court's Resolution Of His Vienna Convention Claim Was Contrary To, Or An Unreasonable Application Of, Controlling Supreme Court Precedent

Even if a treaty right could be treated as a constitutional right, petitioner could not satisfy the AEDPA's standards for awarding relief. The state habeas court denied relief on two grounds at issue here—that the Vienna Convention did not excuse petitioner's procedural default, and that the Vienna Convention does not create individual rights enforceable in a criminal proceeding. Pet. App. 55a-56a. Under the AEDPA, those rulings stand as a barrier to habeas relief

unless the state court rulings were "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. 2254(d)(1). Accordingly, to obtain a COA, petitioner must show that it is at least reasonably "debatable" that the state court's rulings were contrary to, or an unreasonable application of controlling Supreme Court law. See *Miller-El*, 537 U.S. at 335. In seeking to make that showing, petitioner may rely only on decisions of this Court "as of the time of the relevant state-court decision," and only on the "holdings, as opposed to the dicta" of those decisions. *Williams* v. *Taylor*, 529 U.S. 362, 412 (1999).

At the time of the relevant state court decision, *Breard* was the controlling decision on the interaction between the Vienna Convention and state procedural default rules, and *Breard* had held that a State may apply its procedural default rules to Vienna Convention claims. 523 U.S. at 375-376. At that time, there was no holding from this Court on whether the Vienna Convention creates judicially enforceable individual rights. *Breard* was the only decision of the Court that had addressed that issue, and it had done so in inconclusive dicta, stating only that the Vienna Convention "arguably confers on an individual the right to consular assistance following his arrest." *Id.* at 376. The state court's rulings on procedural default and judicial enforceability therefore were not debatably in conflict with, or an unreasonable application of, any holding of this Court.

Petitioner argues (Br. 38-39) that the ICJ decisions in *Avena* and *LaGrand* hold that a State may not rely on procedural default rules to reject his Vienna Convention claim, and that those decisions, rather than *Breard*, should be given effect. Petitioner also argues (Br. 37-39) that the ICJ decisions authoritatively hold that the Vienna Convention provides judicially enforceable individual rights. Whatever the merit of those contentions, they provide no reasonably debatable basis for obtaining relief under the AEDPA and therefore no ground for obtaining a COA. As discussed above, the applicable law for obtaining federal habeas relief is the law at the time of the state court's decision as reflected in holdings of this Court. *Williams*, 529 U.S. at 412. The *Avena* and *LaGrand* decisions were not issued until after the state court habeas ruling, and they are not decisions of this Court. Petitioner therefore cannot rely on them to obtain a COA.

In sum, because the state court procedural-default and judicial-enforceability rulings were not debatably in conflict with, or an unreasonable application of, holdings of this Court, petitioner cannot satisfy the threshold requirement for obtaining a COA. Thus, even assuming that a COA may issue to review a treaty claim, a COA may not issue to review petitioner's treaty claim.

D. The ICJ Decisions Do Not Alter The Requirements For Obtaining A COA

The conclusion that petitioner cannot satisfy the requirements for obtaining a COA is not affected by the Vienna Convention or the ICJ decisions in *Avena* and *LaGrand* interpreting it. Neither the Convention nor the ICJ decisions interpreting it purport to override the AEDPA's requirements that a COA may issue only to review a constitutional claim and that a petitioner must make a threshold showing that his claim is debatable among jurists of reason in light of the AEDPA's standards for granting relief.

In any event, the AEDPA was enacted after the Vienna Convention, and a subsequently enacted statute takes precedence over a previously adopted treaty. *Breard*, 523 U.S. at 376. Accordingly, if there were a conflict, the AEDPA's unambiguous command would displace any contrary rule derived from the Vienna Convention or ICJ decisions interpreting it. *Ibid.*

Enforcement of the AEDPA's threshold requirement for obtaining a COA will not foreclose petitioner from seeking relief based on *Avena* and *LaGrand*. If, as petitioner argues, those decisions require reconsideration of his conviction and sentence as a matter of federal law, he may seek relief on that basis in state court. See *Torres* v. *State*, No. PCD-04-442 (Okla. Crim. App. May 13, 2004) (remanding case for evidentiary hearing on Vienna Convention claim). Should the state courts deny relief, petitioner could seek relief in this Court. Petitioner may not, however, obtain a COA to review his treaty claim, because he failed to satisfy the requirements for obtaining one.

For that reason, the Court should either affirm the court of appeals' judgment refusing to issue a COA or dismiss the writ of certiorari as improvidently granted. The Court should not resolve the questions on which it granted review. Because of their public importance, however, the government now addresses the merits of those questions. The government also sets forth the President's chosen means of complying with the *Avena* decision.

II. ARTICLE 36 OF THE VIENNA CONVENTION DOES NOT PROVIDE A BASIS FOR PETITIONER TO CHALLENGE HIS CONVICTION OR SENTENCE

For two reasons, Article 36 of the Vienna Convention does not provide petitioner with a basis for challenging his conviction or sentence. First, Article 36 does not give a foreign national a judicially enforceable right to challenge his conviction or sentence. And second, even if it did, procedural default rules would preclude consideration of petitioner's Article 36 claim.

A. Article 36 Does Not Authorize Private Judicial Enforcement

1. The Supremacy Clause provides that "all Treaties made, or which shall be made, under Authority of the United States, shall be the supreme Law of the Land." U.S. Const. Art. VI, Cl. 2. Nonetheless, treaties in this country are negotiated against the background understanding that they do not generally create judicially enforceable individual rights. In general, "[a] treaty is primarily a compact between independent nations," and "depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it." *Head Money Cases*, 112 U.S. 580, 598 (1884). When a treaty violation nonetheless occurs, it "becomes the subject of international negotiations and reclamation," not judicial redress. *Ibid.* See *Charlton* v. *Kelly*, 229 U.S. 447, 474 (1913); *Whitney* v. *Robertson*, 124 U.S. 190, 194-95 (1888); *Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 306 (1829) ("The judiciary is not that department of the government, to which the assertion of its interest against foreign powers is confided.").

Treaties can create judicially enforceable private rights, and when they do, they are supreme law. But since such treaties are the exception, rather than the rule, there is a presumption that a treaty will be enforced through political and diplomatic channels, rather than through the courts. *United States* v. *Emuegbunam*, 268 F.3d 377, 389-390 (6th Cir. 2001); *United States* v. *Jimenez-Nava*, 243 F.3d 192, 195-196 (5th Cir. 2001); *United States* v. *De la Pava*, 268 F.3d 157, 164 (2d Cir. 2001); *United States* v. *Li*, 206 F.3d 56, 61 (1st Cir. 2000).

That background principle applies even when a treaty benefits private individuals. "International agreements, even those directly benefitting private persons, generally do not create private rights or provide for a private cause of action in domestic courts." Restatement (Third) of the Foreign Relations Law of the United States § 907 cmt. a, at 395 (1987) (Restatement (Third) of Foreign Relations). For example, in *Argentine Republic* v. *Amerada Hess Shipping Co.*, 488 U.S. 428, 442 & n.10 (1989), the Court held that two

conventions did not create judicially enforceable rights for ship owners, even though one specified that a merchant ship "shall be compensated for any loss or damage" in certain circumstances, and the other specified that "[a] belligerent shall indemnify the damage caused by its violation." The Court explained that the conventions "only set forth substantive rules of conduct and state that compensation shall be paid for certain wrongs." *Id.* at 442. "They do not create private rights of action for foreign corporations to recover compensation from foreign states in United States courts." *Ibid.* See *Johnson* v. *Eisentrager*, 339 U.S. 769, 789 & n.14 (1950) (protections of the Geneva Convention of July 27, 1929, 47 Stat. 2021, are not judicially enforceable).

2. Article 36(1)(b) of the Vienna Convention specifies that "if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested." 21 U.S.T. at 101. In addition, "[a]ny communication addressed to the consular post by the person arrested, * * * shall also be forwarded * * * without delay." *Ibid.* Finally, state authorities "shall inform the person concerned without delay of his rights under [Article 36(1)(b)]." *Ibid.*

Nothing in the Vienna Convention provides that the "rights" specified in Article 36(1)(b) may be privately enforced in a criminal proceeding. Accordingly, consistent with background principles, the State of the foreign national may protest the failure to observe the terms of Article 36 and attempt to negotiate a solution. And if both parties have subscribed to the Optional Protocol, a resolution may be sought from the ICJ. But a foreign national does not have a private right to seek to have his conviction or sentence overturned.

Other Vienna Convention clauses reinforce that conclusion. The Vienna Convention's preamble states that "the purpose of [the] privileges and immunities [created by the

treaty] is not to benefit individuals, but to ensure the efficient performance of functions by consular posts." 21 U.S.T. at 79. And the introductory clause to Article 36 states that it was designed "[w]ith a view to facilitating the exercise of consular functions relating to nationals of the sending State." Those clauses show that "the purpose of Article 36 was to protect a *state's right* to care for its nationals." *De La Pava*, 268 F.3d at 165.

The structure of Article 36 confirms that understanding. The first protection extended is to consular officers, not to individual nationals: Article 36(1)(a) specifies that "consular officers shall be free to communicate with nationals of the sending State and to have access to them." The "rights" of foreign nationals are placed underneath, signaling what the introductory clause spells out—that the function of Article 36(1)(b) is not to create freestanding individual rights but to facilitate a foreign state's right to protect its nationals. Moreover, on a practical level, a foreign national's rights are necessarily subordinate to, and derivative of, his country's rights. An individual may ask for consular assistance, but it is entirely up to the foreign government whether to provide it. That nations may choose to enter into the Optional Protocol, providing an enforcement mechanism in the form of a suit by the offended Nation in the ICJ, underscores that the Treaty confers rights on, and envisions enforcement by, nations, not individuals.

3. The ratification history provides further evidence that Article 36 does not create private rights that may be enforced in a criminal proceeding. See *United States* v. *Stuart*, 489 U.S. 353, 366 (1989) (ratification history is relevant in interpreting treaty). The State Department informed the Senate that "[t]he Vienna Convention does not have the effect of overcoming Federal or State laws beyond the scope long authorized in existing consular conventions." S. Exec. Rep. No. 9, 91st Cong., 1st Sess. 18 (1969). The Senate For-

eign Relations Committee, in turn, cited as a factor in its endorsement of the treaty that "[t]he Convention does not change or affect present U.S. laws or practice." *Id.* at 2. And following ratification of the Vienna Convention, the State Department wrote a letter to all 50 governors explaining it would not require "significant departures from the existing practice within the several states of the United States." *Li*, 206 F.3d at 64. That series of statements would not have been made if the Convention were understood to have given a criminal defendant a private right to challenge his conviction and sentence on the ground that he was not informed as required by Article 36. See Letter from David Andrews, Legal Adviser, Department of State, to James K. Robinson, Assistant Attorney General, Criminal Division, Department of Justice, Re: *United Stats* v. *Li*, No. 97-2034 (1st Cir.) (Oct. 15, 1999); *id.* App. A Department of State Answers to Questions Posed by the First Circuit in *United States* v. *Nai Fook Li* at A9 (State Department Answers).[4]

4. The Executive Branch's interpretation of Article 36 "is entitled to great weight." *Stuart*, 489 U.S. at 369 (quoting *Sumitomo Shojo Am. Inc.* v. *Avagliano*, 457 U.S. 176, 184-185 (1982)). The Executive Branch has never interpreted the Vienna Convention to give a foreign national a

[4] The State Department Answers noted (at A9) that in 1970, the Legal Adviser wrote letters to all fifty states stating that "[w]e do not believe that the Vienna Convention will require significant departures from existing practice within the several states of the United States," and then explained that "[w]e believe that such a statement would not have been made if the Department of State had contemplated that the VCCR might require that failures of consular notification be remedied in the criminal process through prejudice hearings, and possibly the suppression of evidence or the undoing of other aspects of the criminal process." The State Department's letter is available at U.S. Dep't of State, *Digest of United States Practice in International Law 2000*, (last visited Feb. 28, 2005) ch. 2, doc. no. 1, <http://www.state.gov/documents/organization/7111.doc>.

judicially enforceable right to challenge his conviction and sentence. The United States advised the Court of that interpretation in its brief in *Breard*, Brief for the United States at 18-23, *Republic of Paraguay* v. *Gilmore*, 523 U.S. 371 (1998) (No. 97-1390), and *Breard* v. *Greene*, 523 U.S. 371 (1998) (No. 97-8214), and the State Department later reiterated that interpretation in the State Department Answers to the First Circuit's questions in *Li*.

The State Department's interpretation accords with both its practice in enforcing the Vienna Convention and the practice of other parties to the Convention. See *Stuart*, 489 U.S. at 366 ("subsequent operation" of treaty is relevant in interpreting it). The State Department's longstanding practice has been to investigate a country's complaint about the absence of notification. When a violation has been confirmed, the State Department has extended a formal apology to that country's government and sought to prevent a recurrence through educational efforts. State Department Answers A3. It is the State Department's understanding that "this is how consular notification issues have always been handled by the United States under all of the consular conventions to which it is a party, and in situations governed by customary international law." *Id.* at A2-A3. In cases involving the death penalty (and in one other context), the Department has also requested that the violation be considered in clemency.[5]

[5] The United States has also taken substantial measures to implement the Vienna Convention obligation to advise foreign detained nationals that they may contact their consuls. The Department of State publishes and has placed on a public website <http://travel.state.gov/law/consular/consular_636.html>, "Instructions for Federal, State, and other Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them," including 24-hour contact telephone numbers that law enforcement personnel can use to obtain advice and assistance. The Department of State

The State Department's experience abroad has been that foreign governments also usually address complaints about the failure of notification by investigating and extending apologies where appropriate. State Department Answers, at A3. As of 1999, the State Department was not aware of any foreign country that had remedied failures of notification through the criminal justice process. *Id.* at A1, A8. While the Convention has been in force for more than three decades, surveys of state practice have uncovered only seven cases that even touched on the issue, even though more than 160 countries are party to the Vienna Convention. None of these cases has unambiguously endorsed a judicially enforceable individual right to attack a conviction.[6]

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also publishes the "Instructions" as a Consular Notification and Access booklet, publishes a Consular Notification Pocket Card for police pocket use that has the Vienna Convention consular notification warning, and publishes a 2-foot by 3-foot wall poster containing the consular notification in many languages (Arabic, Chinese, Cambodian, Creole, English, Farsi, French, German, Italian, Japanese, Korean, Lao, Polish, Portuguese, Russian, Spanish, Thai, and Vietnamese) (see <http://travel.state.gov/law/info/info_626.html>) that police can post in their facilities. The State Department regularly communicates with the States and law enforcement authorities about ensuring compliance with the consular notification requirements of the Convention.

[6] See *R.* v. *Abbrederis* (June 26, 1981), Australian Case (A1987, A1995) (rejecting remedy); see also *In re Yater*, Italian Case (1973) (A1999) (addressing only Article 36(c), allowing consul to arrange legal representation); *R.* v. *Van Axel & Wezer*, British Case (1991) (A2006); *R.* v. *Bassil & Mouffareg*, British Case (1990) (A2008) (both noting lack of consular notification, but suppressing confessions based on domestic British law). Two other cases addressing the issue before denying relief were a Canadian case, *Regina* v. *Partak* (Oct. 31, 2001) (A1964), which seemed only to have assumed the existence of a judicially cognizable right, and a German case (Nov. 7, 2001) (A1956), which seemed to equate the rights conferred by the Vienna Convention with the rights accorded to Germans, *i.e.*, a right not to be held incommunicado. (All citations are to the Annexes to the Counter-Memorial of the United States in *Avena*.) State

Finally, the government's interpretation of the Vienna Convention is consistent with how the United States has interpreted identical language found in other treaties. For example, the International Convention for the Suppression of the Financing of Terrorism, Jan. 10, 2000, S. Treaty Doc. No. 49, 106th Cong., 2d Sess. (2000) (Terrorist Financing Convention), and the International Convention for the Suppression of Terrorist Bombings, Jan. 12, 1978, S. Treaty Doc. No. 6, 106th Cong., 1st Sess. (1999) (Terrorist Bombing Convention), provide:

> 3. Any person [detained in connection with terrorist financing] shall be entitled to: (a) Communicate without delay with the nearest appropriate representative of [his] State * * * ; (b) Be visited by a representative of that State; (c) Be informed of *that person's rights* under subparagraphs (a) and (b).
>
> 4. The *rights* referred to in paragraph 3 shall be exercised in conformity with the laws and regulations of the State in the territory in which the offender or alleged offender is present, subject to the provision that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under paragraph 3 are intended.

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practice thus shows a glaring absence of private judicial remedies in criminal cases for failures of consular notification. The United States also submitted the declaration in *Avena* of Assistant Secretary of State Maura Hardy (App. A375), analyzing state practice. Hardy concluded that "[b]reaches of Article 36 do not appear to have been raised often in national courts," and that while in some states "criminal defendant might be able to raise violations of Article 36 on appeal, our consular officers, and the local lawyers and government officials that they consulted, doubted the appeals would succeed, particularly if the defendant could not demonstrate that he was prejudiced by the violation." App. A387.

Terrorist Financing Convention, Arts. 9.3-9.4, S. Treaty Doc. No. 49, *supra*, a 7-8 (emphasis added); see also Terrorist Bombings Convention, Art. 7.3, S. Treaty Doc. No. 6, *supra*, at 7-8. In its transmittal package, the Executive Branch explained that this language "like the Convention as a whole as well as other similar counterterrorism conventions, is not intended to create individual rights of action." Transmittal Letter from State Department to President at 7a (Oct. 3, 2000).

5. In sum, Article 36 does not give a foreign national a private right to challenge his conviction and sentence based on an alleged denial of consular assistance. See *Jimenez-Nava*, 243 F.3d at 195-198; *Emuegbunam*, 268 F.3d at 391-394; see also *De La Palva*, 268 F.3d at 163-165; *Li*, 206 F.3d at 66-68 (Selya, J. and Boudin, C.J., concurring).

6. a. The conclusion that individual defendants cannot rely on the Vienna Convention to attack their convictions is fully consistent with the accepted understanding that the Vienna Convention is self-executing. See S. Exec. Rep. No. 9, *supra*, at 5. The Vienna Convention is self-executing in the sense that government officials can provide foreign nationals with access to consular officers without the need for implementing legislation and can give effect to provisions that were intended to be judicially enforced, such as those relating to consular privileges and immunities.[7] But it is an entirely separate question whether Article 36 gives a foreign national a private right to challenge his conviction and sentence on the ground that consular access was denied. Re-

[7] See, *e.g.*, *Risk* v. *Halvorsen*, 936 F.2d 393, 397 (9th Cir. 1991) (finding consular officer immune under Vienna Convention Article 43(1), 21 U.S.T. at 104, because duties were consular functions), cert. denied, 502 U.S. 1035 (1992); *Gerritsen* v. *de la Madrid Hurtado*, 819 F.2d 1511, 1515-1516 (9th Cir. 1987) (recognizing the enforceability of the consular immunity provision of the Convention, but finding that the criminal actions at issue did not qualify for immunity).

statement (Third) of Foreign Relations Law § 111 cmt. h ("whether a treaty is self-executing is a question distinct from whether the treaty creates private rights or remedies."). As discussed above, the available evidence shows that Article 36 does not confer such a right.

The question whether a private individual has a judicially enforceable right is also distinct from the question whether the United States could seek judicial relief in the event that state officials failed to provide a foreign national access to consular officers as required by the Vienna Convention. Under longstanding principles, the government could sue to vindicate a treaty right in the event of its denial. See *Sanitary Dist.* v. *United States*, 266 U.S. 405, 425-426 (1925) (Holmes, J.) (United States has authority to sue "to carry out treaty obligations to a foreign power"; "The Attorney General by virtue of his office may bring [such a] proceeding and no statute is necessary to authorize the suit."). The inherent authority of the United States to bring an action stems from the constitutionally grounded primacy of the national government in the realm of foreign affairs and the need for the United States to be able to effectuate treaty obligations and speak with one voice in dealing with foreign nations. See Section IV (B) & (C), *infra*. No similar principle confers a general right to enforce treaties on private individuals.

b. Petitioner relies (Br. 26-29, 46-47) on this Court's decisions in *United States* v. *Rauscher*, 119 U.S. 407 (1886); *Wildenhus's Case*, 120 U.S. 1 (1887); and *Johnson* v. *Browne*, 205 U.S. 309 (1907), to support his claim that Article 36 confers judicially enforceable individual rights. None of these cases alters the basic principle that treaties do not ordinarily confer individual rights that a foreign national can vindicate in domestic courts, nor are they relevant to the instant question whether the Vienna Convention, by its language, pur-

pose, and drafters' intent, can be categorized as a treaty creating judicially enforceable individual rights.

In *Rauscher*, 119 U.S. at 419-424, the Court held that a criminal defendant who is formally extradited to the United States pursuant to a treaty request may not be prosecuted for an offense other than the one that formed the basis for his extradition. As this Court has explained, the rule of specialty applied by the Court in *Rauscher* had been "implied * * * in the Webster-Ashburton Treaty [on extradition] because of the practice of nations with regard to extradition treaties," and that "any doubt" concerning a fugitive's ability to seek judicial enforcement of the treaty-conferred rule of specialty "was put to rest by two federal statutes which imposed the doctrine of specialty upon extradition treaties to which the United States was a party." *United States* v. *Alvarez-Machain*, 504 U.S. 655, 667 (1992).

In *Johnson* v. *Browne*, 120 U.S. at 320-321, the Court held that a successor treaty to the Webster-Ashburton Treaty at issue in *Rauscher* "prevent[ed] a State from obtaining jurisdiction of an individual whose extradition [wa]s sought on one ground and for one express purpose" (*i.e.*, future prosecution for an offense specified as an extraditable offense under the treaty), "and then us[ing] [its custody of the extradited person] for a different purpose' (*i.e.*, imprisoning the extradited person for a non-extraditable offense on which he had been previously convicted). In reaching that conclusion, the Court did not announce new legal principles; rather, it regarded the result as a natural application of *Rauscher*. *Ibid.* As discussed above, there is no comparable background practice among nations to allow breaches of consular notification requirements to support appeals from criminal convictions, and, unlike the extradition treaties at issue in *Rauscher* and *Johnson* v. *Browne*, Article 36's requirements have never been implemented through congressional legislation.

Petitioner's reliance on *Wildenhus's Case*, 120 U.S. 1 (1887), is similarly misplaced. At issue there was whether the Belgian consul or local authorities had jurisdiction under the terms of a treaty between the United States and Belgium to try a foreign crewman for the murder of another crewman aboard a Belgian vessel anchored in a United States port. As the Court recognized, the treaty provision at issue there "govern[ed] the conduct of the United States and Belgium toward each other in this particular," was "part of the supreme law of the United States," and generally precluded local authorities from prosecuting ship-board offenses, unless such offense was "of a nature to disturb the public peace." *Id.* at 17. In stating that the Belgian consul would have a right of access to the courts to bring a habeas corpus action to vindicate Belgium's exclusive jurisdiction under the treaty, *ibid.*, the Court made clear that the treaty only "settle[d] and define[d] the rights and duties of the contracting parties" (*id.* at 12), and not those of individual seamen aboard foreign vessels in United States ports. There is no suggestion in the Court's decision that the treaty allowed the foreign seaman detained for murder to invoke domestic legal processes to avoid prosecution by local authorities. Nor is the treaty at issue there, which specifically defined and allocated the jurisdiction of courts, analogous to the treaty at issue here, which is silent about the role of courts with respect to consular notification issues.

7. The principle that the Court should give "respectful consideration" to an international court's interpretation of a treaty, *Breard*, 523 U.S. at 375, does not lead to the conclusion that Article 36 affords an individual a right to challenge his conviction and sentence. In *LaGrand* and *Avena*, the ICJ concluded that "Article 36, paragraph 1, creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in this Court by the national State of the detained person." *LaGrand*, 2001 I.C.J. ¶ 77, at 493; Pet. App.

214a, para. 40. That passage does not state that Article 36 gives a foreign national a domestically enforceable private right. Instead, consistent with the position stated in this brief, it states only that, when there has been a denial of foreign national's Article 36 rights, a *State* may seek relief *from the ICJ*.

In *LaGrand*, the ICJ concluded that, because the United States failed to inform the LaGrand brothers of their rights as required by Article 36(1), its later application of a procedural default rule to refuse to consider their claim of prejudice arising from that breach violated Article 36(2)'s requirement that the laws of the receiving State "must enable full effect to be given to the purposes for which the rights accorded under this Article are intended." 2001 I.C.J. ¶ 91, at 497-498. That conclusion presupposes either that Article 36(1)'s reference to "rights," Article 36(2)'s "full effect" requirement, or the two together create an obligation for criminal courts (or perhaps some other entity) to attach "legal significance" to a violation of Article 36(1) in a criminal proceeding. See *ibid.*; *Avena*, Pet. App. 248a-249a, para. 113. While the ICJ's understanding of the Convention's requirements is entitled to respectful consideration, it is ultimately the responsibility of this Court to interpret the meaning of a federal treaty. Moreover, the level of "consideration" is at its nadir when the Executive Branch, whose views on treaty interpretation are entitled to at least "great weight," has considered the ICJ's decisions and determined that its own longstanding interpretation of the treaty is the correct one. Under those circumstances and in light of the considerations discussed above, the correct reading of Article 36 is that it does not give a criminal defendant a private right to challenge his conviction and sentence on the ground that Article 36 was breached.

B. The Vienna Convention Does Not Preclude Application Of Procedural Default Principles

Even if Article 36 did give a foreign national a private right to challenge his conviction and sentence on the ground that Article 36 was breached, that would not mean that the Convention required the Texas habeas court to review and reconsider petitioner's Vienna Convention claim. Petitioner procedurally defaulted his claim by failing to raise it at trial. Procedural default is an adequate and independent ground supporting the state habeas court's judgment, *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), and the Vienna Convention does not preclude application of procedural default rules.

The Court definitely resolved that issue of treaty interpretation in *Breard*. In that case, the Court held that the procedural rules of the forum State, including rules on procedural default, govern implementation of the Vienna Convention. 523 U.S. at 375. The Court reasoned that, under a background international law principle, the procedural rules of the forum State govern implementation of a treaty absent "a clear and express statement to the contrary," and that, by providing that Article 36 rights "shall be exercised in conformity with the laws and regulations of the receiving State," Article 36(2) reinforced, rather than overcame, that default rule. *Ibid.*

As discussed above, the ICJ in *LaGrand* concluded that applying procedural default to bar consideration of a challenge to a defendant's conviction and sentence violates Article 36(2)'s requirement that laws of the forum state "must enable full effect to be given to the purposes for which the rights accorded under this Article are intended." But a general "full effect" clause cannot be understood to override application of rules that are as deeply embedded in the criminal justice system as rules of procedural default. At the very least, a general "full effect" clause falls short of supplying "a

clear and express statement" (*Breard*, 523 U.S. at 375) that ordinary procedural default rules cannot be applied.

Application of the principle that a criminal defendant defaults a claim that he has not presented at trial no more prevents full effect from being given to the purposes of Article 36 than it prevents full effect from being given to the purposes of constitutional rights, such as the right against compelled self- incrimination. See *Ylst* v. *Nunnemaker*, 501 U.S. 797, 801 (1991) (procedural default applies to *Miranda* claims); *Wainwright* v. *Sykes*, 434 U.S. at 87-88 (procedural default applies to voluntariness claims). A procedural default rule always operates to cut off what otherwise might be a valid claim. Accordingly, the possibility that it might have that effect on a Vienna Convention claim is not a sufficient basis for concluding that full effect is not being given to the purposes of Article 36.

Nor is the possibility that a foreign national might not be aware of the rights specified in Article 36 a sufficient basis for reaching that conclusion. A reasonably diligent counsel should be in a position to assert any potential Vienna Convention claim at trial. The Vienna Convention has been in effect since 1969, it is published at 21 U.S.T. 77, 596 U.N.T.S. 262, and it has been mentioned in several reported decisions. *Murphy*, 116 F.3d at 100. "Treaties are one of the first sources that would be consulted by a reasonably diligent counsel representing a foreign national." *Ibid.* Other defendants had been relying on the Vienna Convention years before petitioner's prosecution. See *ibid.* (citing *Faulder* v. *Johnson*, 81 F.3d 515, 530 (5th Cir.), cert. denied, 519 U.S. 995 (1996), in which habeas counsel had located the Vienna Convention before the 1992 filing date of the habeas petition). Cf. *Bousley* v. *United States*, 523 U.S. 614, 622 (1998) (claim clearly is reasonably available to counsel when other defendants are raising it). Relying on counsel to identify a Vienna Convention claim is no different from relying on

counsel to raise potential constitutional claims that are unknown to the defendant. Thus, while the ICJ's interpretation of Article 36(2) is entitled to respectful consideration, it does not provide a basis for the Court to overrule its controlling decision in *Breard*.

III. THE *AVENA* DECISION IS NOT PRIVATELY ENFORCEABLE

Petitioner principally contends (Br. 19-37) that Article 36 of the Vienna Convention, the Optional Protocol, Article 94 of the United Nations Charter, 59 Stat. 1031, and Article 59 of the ICJ statute, 59 Stat. 1055, make the ICJ's *Avena* decision a binding rule of decision in the state and federal courts of the United States. None of those sources, however, qualifies the *Avena* decision, standing alone, as privately enforceable federal law.

A. As discussed in Section II, *supra*, Article 36 does not give foreign nationals a right that can be enforced through an attack on a criminal judgment. More important for present purposes, however, Article 36 does not mention the possible effect of an ICJ decision. Article 36 therefore cannot be a source for private enforcement of an ICJ decision.

By subscribing to the Optional Protocol, the United States agreed that, as long as it remains a party to the Protocol, "[d]isputes arising out of the interpretation or application of the [Vienna Convention] shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol." 21 U.S.T. at 326, 596 U.N.T.S. at 488. The Optional Protocol, however, operates only as a grant of "jurisdiction" to the ICJ over suits brought by other Nations that are parties to the Optional Protocol. It does not commit the United States to comply with a resulting ICJ decision,

much less make such a decision privately enforceable in a criminal proceeding by an individual.

B. The source of the United States' obligation to comply with ICJ decisions is not the Optional Protocol, but Article 94 of the U.N. Charter, which is itself a treaty. It provides that "[e]ach member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party." Article 94 imposes an international duty on the United States to comply with ICJ decisions in a case in which the U.N. Member is a party by its consent to ICJ jurisdiction. But as the text and background of Article 94 demonstrate, it does not make an ICJ decision privately enforceable in court. And that is particularly true in light of the background presumption that treaties do not give rise to private, judicially enforceable rights.

1. Article 94 states that a U.N. member "undertakes to comply" with an ICJ decision. The phrase "undertakes to comply" does not constitute an acknowledgment that an ICJ decision will have immediate legal effect in the courts of U.N. members. Instead, it constitutes a *commitment* on the part of U.N. members to take *future* action through their political branches to comply with an ICJ decision.

Furthermore, because Article 94(1) does not detail the means of compliance with an ICJ decision, it necessarily contemplates that the political branches of member Nations would have discretion to choose how to comply. If an ICJ decision were subject to immediate private enforcement in the courts of member Nations, it would rob the political branches of that discretion. Likewise, even if a Nation decides to comply with the decision in a particular case, it retains the option of protecting itself from further decisions based on the legal principles of that case by withdrawing from the Optional Protocol. Giving automatic effect to the reasoning of an ICJ decision—for example, by recognizing an individual right on the strength of the *Avena* decision—robs

the political branches of the discretion to limit the effect of a decision to those covered by the decision by withdrawing from the Optional Protocol.

2. Article 94(2) of the U.N. Charter confirms that ICJ decisions are not privately enforceable in the courts of member Nations. It provides that "[i]f any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment." 59 Stat. 1051. Article 94(2) envisions that the political branches of a Nation may choose not to comply with an ICJ decision, and provides that, in that event, recourse to the Security Council is the sole remedy. Private judicial enforcement in domestic courts is incompatible with that enforcement structure. If ICJ decisions became immediately enforceable in domestic courts, Article 94(2) would be superfluous.

3. There is no relevant evidence in the ratification history that ICJ decisions would be judicially enforceable. Instead, the understanding was that ICJ decisions would be subject to enforcement by the Security Council. The Executive Branch expressed that view during consideration of the U.N. Charter.[8] It expressed that view one year later when

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[8] Report to the President on the Results of the San Francisco Conference by the Chairman of the United States Delegation, the Secretary of State (June 26, 1945) (statement of Secretary of State Edward R. Stettinius, Jr.) ("The first paragraph of Article 94 is a simple statement of the obligation of each Member of the United Nations to comply with the decision in any case to which it is a party. The second paragraph of this Article links this part of the Charter's system of pacific settlement of disputes with other parts by providing that if a state fails to perform its obligations under a judgment of the Court, the other party may have recourse to the Security Council which may, if it deems it necessary, take appropriate steps to give effect to the judgment."). The Charter of the United Nations

the Senate considered the declaration accepting compulsory jurisdiction of the ICJ.[9] And Senators expressed that view during debate on accepting compulsory ICJ jurisdiction.[10]

4. The D.C. Circuit is the only court of appeals that has addressed the issue, and it has held that ICJ decisions are not privately enforceable. See *Committee of United States Citizens Living in Nicaragua* v. *Reagan*, 859 F.2d 929, 938 (D.C. Cir. 1988). That court reasoned that "[t]he words of Article 94 'do not by their terms confer rights upon individ-

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for the Maintenance of International Peace and Security: Hearings Before the Senate Comm. on Foreign Relations (Senate Hearings) (1945), 79th Cong., 1st Sess. 124-125; *7/10/45 Senate Hearings* 286 (statement of Leo Paslovsky, Special Assistant to the Secretary of State for International Organizations and Security Affairs) ("[W]hen the Court has rendered a judgment and one of the parties refuses to accept it, then the dispute becomes political rather than legal. It is as a political dispute that the matter is referred to the Security Council."); *id.* at 330-331 (statement of Green H. Hackworth, State Department Legal Adviser (Article 94(2) provides the means of enforcing ICJ decisions).

[9] *A Resolution Proposing Acceptance of Compulsory Jurisdiction of International Court of Justice: Hearings on S. Res. 196 Before the Subcomm. of the Senate Comm. on Foreign Relations, 79th* Cong., *2d* Sess. 142 (1946) (statement of Charles Fahy, State Department Legal Adviser) (parties have "a moral obligation" to comply with ICJ decisions, and Article 94(2) constitutes the exclusive means of enforcing such decisions).

[10] 92 Cong. Rec. 10,694 (1946) (statement of Senator Pepper) ("The power of effective enforcement lies only in the Security Council; and in the Security Council an effective decision cannot be made to take action against a nation unless there is unanimity of the Big Five. Therefore, so far as the United States is concerned, a power which of necessity will always be a party to the Security Council under the provisions which require the Big Five to be permanent members of the Security Council, the United States will always have the power, through the exercise of the veto, to prevent effective enforcement of a judgment of the Court against the United States.); *id.* at 10,695 (statement of Senator Connally) ("[W]hen the Court undert[akes] to enforce its judgment by certifying the question to the Security Council, we could tell the Court and the Security Council to take a walk.").

ual citizens; they call upon governments to take certain action.'" *Ibid.* (citation omitted). The D.C. Circuit's analysis is sound. Article 94 creates an international obligation on U.N. members to comply with an ICJ decision; it does not empower a private individual to enforce it.[11]

C. Article 59 of the ICJ statute, 59 Stat. 1055, incorporated into the U.N. Charter, provides that "[t]he decision of the [ICJ] has no binding force except between the parties and in respect of that particular case." That statute reinforces what the U.N. Charter establishes—that the ICJ decision is "binding" in the sense that parties have an international obligation to comply with the decision. It does not provide that the ICJ's "binding" decision is judicially enforceable. Indeed, the ICJ statute affirmatively negates the possibility of private judicial enforcement because it makes an ICJ decision binding only "between the parties," and a private individual cannot be a party to an ICJ dispute. Thus, the Vienna Convention, the Optional Protocol, the U.N. Charter, and the ICJ Statute do not either alone or in combination make an ICJ decision judicially enforceable.

D. Nor did the ICJ purport to make its *Avena* decision immediately enforceable in United States courts. The ICJ determined that the United States' obligation was "to provide, *by means of its own choosing*, review and reconsideration of the convictions and sentences of the [affected] Mexican nationals." Pet. App. 273a, para. (9) (emphasis added).

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[11] Courts addressing other provisions of the U.N. Charter have also held that they are not judicially enforceable. See *Flores* v. *Southern Peru Copper Corp.*, 343 F.3d 140, 156 n.24 (2d Cir. 2003) (U.N. Charter is not self-executing); *Frolova* v. *USSR*, 761 F.2d 370, 374 (7th Cir. 1985) (Articles 55 and 56 of the U.N. Charter are not self-executing); *Spiess* v. *C. Itoh & Co. (Am.), Inc.*, 643 F.2d 353, 363 (5th Cir. 1981) (U.N. Charter is not self- executing), vacated on other grounds, 457 U.S. 1128 (1982); *Hitai* v. *INS*, 343 F.2d 466 (2d Cir. 1965) (Article 55 of the U.N. Charter is not self-executing).

By seeking immediate judicial enforcement, petitioner would deprive the political branches of the very choice of means that the ICJ intended for them to have.

E. In arguing that the ICJ decision is judicially enforceable, petitioner places great weight (Br. 30-31, 36) on the accepted understanding that the Vienna Convention is self-executing. That reliance is misplaced for two reasons. First, petitioner mistakenly equates a self-executing treaty with a privately enforceable one. As previously discussed, while Article 36 is self-executing in the sense that state authorities are required to observe the terms of the Convention without implementing legislation, it does not confer any judicially enforceable private rights. See Section II, *supra*.

More fundamentally, even if Article 36 were privately enforceable, that would not make an ICJ decision privately enforceable. The United States' obligation to comply with an ICJ decision does not flow from the Vienna Convention, but from Article 94 of the U.N. Charter. And as discussed above, under Article 94, an ICJ decision is not privately enforceable.

IV. THE PRESIDENT HAS DETERMINED THAT, WITH RESPECT TO 51 INDIVIDUALS, THE *AVENA* DECISION SHOULD BE ENFORCED IN STATE COURTS IN ACCORDANCE WITH PRINCIPLES OF COMITY

A. Even though an ICJ decision is not privately enforceable, the United States has an international obligation under Article 94 to comply with the *Avena* decision.[12] In *Avena*,

[12] In the language of the U.N. Charter, the United States has an international law obligation to comply with the "decision" of the ICJ. U.N. Charter 94(1). The decision does not have force as precedent. See ICJ Statute Art. 59 ("The decision of the [ICJ] has no binding force except between the parties and in respect of that particular case."). This brief uses the term "decision" to refer to the portion of the ICJ ruling with which the United States has an international obligation to comply—what

the ICJ found that the United States had violated the Vienna Convention by not informing 51 Mexican nationals, including petitioner, of their rights under Article 36(1)(b), and by not notifying consular authorities of the detention of 49 Mexican nationals, including petitioner. Pet. App. 271a, paras. (4) and (5). The ICJ made additional findings with respect to violations of Mexico's rights under Article 36(1)(a) and (c). *Id.* at 271a-272a, paras. (6) and (7).

The ICJ found that the appropriate remedy "consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the [affected] Mexican nationals, * * * by taking [into] account paragraphs 138 to 141 of this Judgment." Pet. App. 273a, para. (9). In paragraph 138, the ICJ stated that review and reconsideration should "guarantee that the violation and the possible prejudice caused by that violation will be fully examined and taken into account." *Id.* at 261a. In paragraph 143, the ICJ found "that the clemency process, as currently practiced within the United States criminal justice system, does not appear to meet the requirements described in paragraph 138 above and that it is therefore not sufficient in itself to serve as an appropriate means of 'review and reconsideration' as envisaged by the Court." *Id.* at 263a. In paragraph 140, the ICJ stated that it "considers that it is the judicial process that is suited to this task." *Id.* at 262a. The ICJ elsewhere stated that the United States should "permit review and reconsideration of these nationals' cases by the United States courts, * * * with a view to ascertaining whether in each case the violation of Article 36 committed by the competent authorities caused actual prejudice to the defendant

in United States practice would be called the judgment. The United States does not have an international obligation to acquiesce in or follow the legal reasoning of the opinion.

in the process of administration of criminal justice." *Id.* at 253a, para. (121).

The ICJ decision is ambiguous on some key points. But the Executive Branch interprets the decision to place the United States under an international obligation to choose a means for 51 individuals to receive review and reconsideration of their convictions and sentences to determine whether the denial of the Article 36 rights identified by the ICJ caused actual prejudice to the defense either at trial or at sentencing.

B. The President is "the sole organ of the federal government in the field of international relations." *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936). The President, through subordinate Executive Branch officials, represents the United States in cases before the ICJ, and the President's representative serves as delegate to the United Nations and acts on his behalf in the Security Council if controversies should arise over compliance with an ICJ decision. See 22 U.S.C. 287 (authorizing the President to appoint persons to represent the United States in the United Nations); 22 U.S.C. 287a (persons appointed under Section 287 shall, "at all times, act in accordance with the instructions of the President"). In addition, the President enjoys "a degree of independent authority to act" in "foreign affairs." *American Ins. Assoc.* v. *Garamendi*, 539 U.S. 396, 414 (2003). Against those background understandings, Article 94 implicitly grants the President "the lead role" in determining how to respond to an ICJ decision. Cf. *id.* at 415 (internal quotation marks omitted); see also *First Nat'l City Bank* v. *Banco Nacional de Cuba*, 460 U.S. 759, 767 (1972) (plurality opinion).

In particular circumstances, the President may decide that the United States will not comply with an ICJ decision and direct a United States veto of any proposed Security

Council enforcement measure.[13] Here, however, the President has determined that the foreign policy interests of the United States justify compliance with the ICJ's decision. Consular assistance is a vital safeguard for Americans abroad, and the government has determined that, unless the United States fulfills its international obligation to achieve compliance with the ICJ *Avena* decision, its ability to secure such assistance could be adversely affected.

Once the President makes a decision to comply with an ICJ decision, the President must then consider the most appropriate means of compliance. In some cases, compliance may be achieved through unilateral Executive Branch action. In other cases, the Executive Branch may seek implementing legislation as a means of compliance. In this instance, in light of the paramount interest of the United States in prompt compliance with the ICJ's decision with respect to the 51 named individuals, and the suitability of judicial review as a means of compliance, the President has made the following determination:

> I have determined, pursuant to the authority vested in me as President by the Constitution and laws of the United States, that the United States will discharge its international obligations under the decision of the Inter-

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[13] That was the case with respect to the ICJ's ruling in *Nicaragua* v. *United States*, 1986 I.C.J. Rep. 14, 146, 25 I.L.M. 1337 (1986) in which the ICJ ruled that the United States was obligated to cease certain activities in Nicaragua and to make reparation to that country for injuries purportedly caused by breaches of customary international law. The United States, which had withdrawn its submission to the ICJ's jurisdiction and withdrawn from proceedings before the ICJ, refused to recognize the validity of the ICJ's decision, did not pay reparation to Nicaragua, and subsequently vetoed a U.N. Security Council resolution calling for it to comply with the ICJ's judgment. United Nations Security Council: Excerpts from Verbatim Records Discussing I.C.J. Judgment in *Nicaragua* v. *United States*, 25 I.L.M. 1337, 1352, 1363 (1986).

national Court of Justice in the *Case Concerning Avena and Other Mexican Nationals (Mexico* v. *United States of American* (*Avena*), 2004 I.C.J. 128 (Mar. 31), by having state courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.

Memorandum for the Attorney General, App. *infra*.

Under that determination, in order to obtain "review and reconsideration" of their convictions and sentences in light of the decision of the ICJ in *Avena*, the 51 named individuals may file a petition in state court seeking such review and reconsideration, and the state courts are to recognize the *Avena* decision. In other words, when such an individual applies for relief to a state court with jurisdiction over his case, the *Avena* decision should be given effect by the state court in accordance with the President's determination that the decision should be enforced under general principles of comity.

Because compliance with the ICJ's decision can be achieved through judicial process, and because there is a pressing need for expeditious compliance with that decision, the President determined to exercise his constitutional foreign affairs authority and his authority under Article 94 of the U.N. Charter to establish that binding federal rule without the need for implementing legislation. Cf. *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981); *Sanitary Dist.* v. *United States*, 266 U.S. 405 (1925). The authority of the President to determine the means by which the United States will implement its international legal obligations is especially important in the context of a treaty, like the Vienna Convention, that not only protects foreign nationals in this country, but also protects Americans overseas. Under the Constitution, it is the President alone who—through diplomatic and other means—can protect Americans deprived of liberty abroad. Congress has recognized that the President alone can perform the diplomatic protective function of Americans abroad. See 22 U.S.C. 1732.[14] In deciding what actions the United States will take to implement its Vienna Convention obligations and to address the ICJ decision in *Avena*, the President must make delicate and complex calculations—for which he is uniquely suited—taking into account the need for the United States to be able to enforce its laws effectively against foreign nationals in the United States, the need for the United States to be able to protect Americans abroad, judgments about the likely responses of various foreign countries to potential United States actions with respect to the Vienna Convention, and other United States foreign policy interests.

To the extent that state procedural default rules would prevent giving effect to the President's determination that the *Avena* decision should be enforced in accordance with principles of comity, those rules must give way, because Executive action that is undertaken pursuant to the President's authority under Article II of the Constitution and authorized by his power to represent the United States in the United Nations, see U.N. Charter Art. 94, constitutes "the supreme

[14] Section 1732 provides:

> Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war and not otherwise prohibited by law, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress.

Law of the Land." U.S. Const. Art. VI, Cl. 2. State courts are not required to reach any particular outcome, but are instead to evaluate in each case whether the violation of Article 36 "caused actual prejudice to the defendant in the process of administration of criminal justice," Pet. App. 253a, bearing in mind that "speculative * * * claims of prejudice" (*Breard*, 523 U.S. at 377) do not warrant relief. The state court judgments addressing those individuals' claims would raise federal issues that are ultimately reviewable in this Court.[15]

C. The President's authority to issue his determination rests not only on his authority to determine how the United States will respond to an ICJ decision, see U.N. Charter Art. 94, but also on the President's authority under Article II of the Constitution to manage foreign affairs. "Although the source of the President's power to act in foreign affairs does not enjoy any textual detail, the historic gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations.'" *American Ins. Assoc.* v. *Garamendi*, 539 U.S. at 414 (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 610-611 (1952) (Frankfurter, J., concurring)). In the field of foreign relations, "the President has a degree of independent authority to act." *Garamendi*, 539 U.S. at 414. The President's Article II power over foreign affairs "does not require as a basis for its exercise an act of Congress." *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936); see *Sanitary Dist.*, 266 U.S. at 425-426 (authority of the Attorney General

[15] Any claims brought on federal habeas corpus, if the state courts denied relief, would have to satisfy the requirements of the AEDPA. *Cf. Breard*, 523 U.S. at 376.

to bring an action in court to secure compliance with a treaty does not require legislation).[16]

Consistent with that understanding, the Court has repeatedly held that the President has authority to make executive agreements with other countries to settle claims without ratification by the Senate or approval by Congress. *Garamendi*, 539 U.S. at 415; *Dames & Moore* v. *Regan*, 453 U.S. at 679, 682-683; *United States* v. *Pink*, 315 U.S. 203, 223 (1942); *United States* v. *Belmont*, 301 U.S. 324, 330-331 (1937). The Court has also held that such agreements preempt conflicting state law. *Garamendi*, 539 U.S. at 416-417; *Pink*, 315 U.S. at 223, 230-231; *Belmont*, 301 U.S. at 327, 331.

If, as those cases hold, the President may enter into an executive agreement to resolve a dispute with a foreign government, the President should be equally free to resolve a dispute with a foreign government by determining how the United States will comply with a decision reached after the completion of formal dispute-resolution procedures with that foreign government. To require the President to enter into yet another formal bilateral agreement in order to exercise his power "would hamstring the President in settling international controversies" and weaken this Nation's ability to fulfill its treaty obligations. *Garamendi*, 539 U.S. at 416.

[16] Recognition of a similar independent Executive authority is reflected in the Court's holdings that the judiciary had a "duty" to give effect to the Executive's suggestion of a foreign sovereign's immunity. See, *e.g.*, *Compania Espanola de Navegacion Maritima* v. *The Navemar*, 303 U.S. 68, 74 (1938) ("If the claim is recognized and allowed by the executive branch of the government, it is then the duty of the courts to release the vessel upon appropriate suggestion by the Attorney General of the United States, or other officer acting under his direction."); *Ex parte Republic of Peru*, 318 U.S. 578, 587-589 (1943); *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 35 (1945) ("It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.").

Such a limitation would fail to recognize the practical reality that there are occasions when a foreign government may acquiesce in a resolution that it is unwilling to formally approve. It would also fail to recognize that obtaining a formal agreement can be a time-consuming process that is ill-suited for occasions when swift action is required. And it would have the perverse effect of assigning to a foreign government veto power over the President's exercise of his authority over foreign affairs.

D. As explained above, the President's determination is that the *Avena* decision is to be enforced in accordance with principles of comity. Accordingly, a state court would not be free to reexamine whether the ICJ correctly determined the facts or correctly interpreted the Vienna Convention. Under principles of comity, "the merits of the case should not * * * be tried afresh, as on a new trial or an appeal, upon the mere assertion * * * that the judgment was erroneous in law or in fact." *Hilton* v. *Guyot*, 159 U.S. 113, 203 (1895). When principles of comity apply, a foreign judgment is given effect without reexamination of the merits of the decision, provided that the court rendering the judgment had jurisdiction, the court was impartial, its procedures satisfied due process, and there is no "special reason why the comity of this nation should not allow it full effect." *Id.* at 202. The President's determination that the ICJ decision is entitled to comity is consistent with those principles.

Further, as noted above, under the ICJ statute, ICJ decisions are binding only "between the parties" and "in respect of that particular case." 59 Stat. 1062. The ICJ's decision in *Avena* found violations of the Vienna Convention with respect to 51 specific individuals. The President's determination that judicial review and reconsideration should be afforded in this nation's courts applies to the 51 individuals whose rights were determined in the *Avena* case. The scope of the President's determination is thus consistent with the

scope of the ICJ's specific determinations in the individual cases before it.

The President's determination that domestic courts should provide review and reconsideration under the ICJ's decision, without prejudice to the courts' power to consider afresh in other cases the underlying treaty-interpretation and application issues subsumed in the ICJ's rulings, accords with general standards for determining when judgments against the United States are binding in subsequent litigation. When a party has obtained a final judgment against the United States, that judgment is binding in subsequent litigation between the United States and that party. The United States is not free to relitigate the merits of the particular dispute. See *United States* v. *Stauffer Chem. Co.*, 464 U.S. 165 (1984); *Montana* v. *United States*, 440 U.S. 147 (1979). In contrast, a judgment against the United States obtained by one party does not preclude the United States from relitigating the underlying merits of particular legal theories in actions brought by or against other parties. See *United States* v. *Mendoza*, 464 U.S. 154 (1984). Analogous principles here justify the President's decision to give effect to the final decision of the ICJ with respect to the 51 named individuals whose rights under the Vienna Convention were found to be violated, while leaving the government and the courts free to address the underlying merits in other cases.

E. Once the conditions for application of the Executive Branch determination are satisfied, a state court is required to review and reconsider the conviction and sentence of the affected individual to determine whether the violations identified by the ICJ caused actual prejudice to the defense at trial or at sentencing, bearing in mind that speculative showings of prejudice are insufficient. *Breard*, 523 U.S. at 377. If prejudice were found, a new trial or a new sentencing would be ordered. A state court may not, however,

interpose procedural default to prevent review and reconsideration.

Nothing in the Court's *Breard* decision is inconsistent with that conclusion. As already discussed, *Breard* holds that the Vienna Convention does not prevent application of procedural default rules to a Vienna Convention claim. 523 U.S. at 375. The President's determination, which means that procedural default rules may not prevent review and reconsideration for the 51 individuals identified in *Avena*, is emphatically *not* premised on a different interpretation of the Vienna Convention. To the contrary, as explained in Section II, the Executive Branch regards the Court's holding in *Breard* as controlling on that issue. Nonetheless, pursuant to his authority under the U.N. Charter and Article II of the Constitution, the President has determined that the foreign policy interests of the United States in meeting its international obligations and protecting Americans abroad require the ICJ's decision to be enforced without regard to the merits of the ICJ's interpretation of the Vienna Convention. Just as *Breard* would not stand in the way of legislation that provided for the implementation of the *Avena* decision, it does not stand in the way of the President's determination that the *Avena* decision should be given effect.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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FEBRUARY 2005

APPENDIX 1

1. The Supremacy Clause to the Constitution, U.S. Const. Art. 6, Cl. 2, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * * * *

2. The Vienna Convention on Consular Relations, Dec. 14, 1969, 21 U.S.T. 77, provides in its Preamble and Article 36:

> The States Parties to the present Convention,
>
> Recalling that consular relations have been established between peoples since ancient times,
>
> Having in mind the Purposes and Principles of the Charter of the United Nations concerning the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations,
>
> Considering that the United Nations Conference on Diplomatic Intercourse and Immunities adopted the Vienna Convention on Diplomatic Relations which was opened for signature on 18 April 1961,
>
> Believing that an international convention on consular relations, privileges and immunities would also contribute to the development of friendly relations

among nations, irrespective of their differing constitutional and social systems,

Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States,

Affirming that the rules of customary international law continue to govern matters not expressly regulated by the provisions of the present Convention,

Have agreed as follows:

* * * * *

Article 36

Communication and contact with nationals of the sending State

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested,

in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

3. The Optional Protocol Concerning the Compulsory Settlement of Disputes, 21 U.S.T. 325, provides in pertinent part:

> The States Parties to the present Protocol and to the Vienna Convention on Consular Relations, hereinafter referred to as "the Convention", adopted by the United Nations Conference held at Vienna from 4 March to 22 April 1963,
>
> Expressing their wish to resort in all matters concerning them in respect of any dispute arising out of the interpretation or application of the Convention to the compulsory jurisdiction of the International Court of Justice,

unless some other form of settlement has been agreed upon by the parties within a reasonable period,

Have agreed as follows:

Article I

Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.

* * * * *

5. Article 94 of the United Nations Charter, 59 Stat. 1051, provides:

1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.

2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

5. Article 59 of the statute of the International Court of Justice, 59 Stat. 1062, provides:

The decision of the Court has no binding force except between the parties and in respect of that particular case.

6. 28 U.S.C. 2253 provides in pertinent part:

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

7. 28 U.S.C. 2254 provides in pertinent part:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

* * * * *

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States * * *.

* * * * *

APPENDIX 2

THE WHITE HOUSE

WASHINGTON

February 28, 2005

MEMORANDUM FOR THE ATTORNEY GENERAL

SUBJECT: Compliance with the Decision of the International Court of Justice in *Avena*

The United States is a party to the Vienna Convention on Consular Relations (the "Convention") and the Convention's Optional Protocol Concerning the Compulsory Settlement of Disputes (Optional Protocol), which gives the International Court of Justice (ICJ) jurisdiction to decide disputes concerning the "interpretation and application" of the Convention.

I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligations under the decision of the International Court of Justice in the *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (Avena)*, 2004 ICJ 128 (Mar. 31), by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.